in the

Supreme Court
of the
United States

NO. 77-1145

LOUIS VERNELL, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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LOUIS VERNELL, JR.,

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The Petitioner, Louis Vernell, Jr., respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals Fifth Circuit, entered on September 21, 1977. (App. "A"). A timely Petition for Rehearing was denied on November 14, 1977.

OPINION BELOW

The judgment of the Court of Appeals was entered without hearing pursuant to its Local Rule 18 and served to affirm the summary dismissal of a Petition to Vacate Conviction filed pursuant to 28 U.S.C. 2255. The opinion of the Circuit Court is reported at 559 F.2d 963.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1):

> "By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

Jurisdiction is also invoked under Rule 19(1)(b) of the Rules of the Supreme Court of the United States:

> "Where a court of appeal has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

QUESTION PRESENTED

Where a 28 U.S.C. 2255 Petition to Vacate Conviction alleges grounds sufficient to make requisite the vacating of Petitioner's conviction, i.e.: (1) unauthorized wiretapping; (2) deliberate suppression of exculpatory evidence; and (3), the Government's knowing use of perjurious testimony and false records, are Petitioner's constitutional rights of due process and equal protection under the law violated where such Petition is summarily dismissed without evidentiary hearing, notwithstanding that none of such grounds were ever previously heard or determined on the merits?

RULES AND STATUTES INVOLVED

Title 28 U.S. Code, 2255. Federal custody; remedies on motion attacking sentence.

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the grounds that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set

the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention".

STATEMENT

Petitioner, a practicing attorney in the State of Florida for 27 years, was convicted after jury trial in the United States District Court for the Southern District of Florida of the offense(s) of wilfull failure to file income tax returns for the taxable years 1967 through 1971, as proscribed by 26 U.S.C. Section 7203. Upon adjudication, Petitioner was sentenced to concurrent terms of nine months imprisonment and fined $5,000.

Prior to trial, the parties stipulated to all elements of the offense, save for the issue of wilfulness. To negate such singular element, the Petitioner sought to establish that a myriad of circumstances precluded an earlier filing of Petitioner's returns which included the loss and destruction of Petitioner's records; the ill health and repeated "intensive care" hospitalizations of Petitioner's wife; Petitioner's own deteriorated health; his absence from the country; and other matters related to the pressure and requirements of Petitioner's law practice.

Aside from such evidentiary matters, the very *crux* of Petitioner's defense rested on his ability to demonstrate: (1) that Petitioner had, in fact, filed *all* of the required tax returns and fully paid *all* taxes due thereon, almost *one year prior* to the filing of Information in the cause; (2) *that during each of the years charged in the Information, the Petitioner did, in fact, make timely and appropriate application(s) for extension of time to file required returns and that such extensions had been granted to him by the Internal Revenue Service.*

Although the Government conceded all other factual matters presented in Petitioner's defense, it vigorously denied both the filing of Petitioner's applications for extensions of time and/or the granting of the same. Because of the prior loss of Petitioner's records, the Petitioner was unable to establish the filing and/or granting of such extensions, except through his own testimony.

In direct conflict therewith, the Government placed into evidence what it represented were the "complete" records of "all of the transactions" of the Petitioner as well as the testimony of "the personal representative of the District Director", Walter McDaniel. Such records and testimony diametrically conflicted with Petitioner's own sworn testimony. At one point in the trial the Government actually pitted Petitioner's testimony against the McDaniel testimony and records, viz: (App. B).

"Vernell — Cross

Q. Now, you heard the testimony of Mr. McDaniel?

A. Yes, sir.

Q. Have you examined Government Exhibit No. 1 — No. 8?

A. Relative to my extension applications?

Q. Yes, sir.

A. Yes.

Q. They don't show that you filed extensions for all those years, do they?

A. They are incorrect.

Q. You believe they are incorrect?

A. I know they are incorrect."

Aside from the exculpatory effect of such extensions, the dispute concerning the filing and/or granting of the same constituted the sole test of Petitioner's credibility. Absent physical evidence to support Petitioner's sworn testimony, the prohibitive force of the government's "official records" and the testimony of such ranking I.R.S. representative served to fully discredit Petitioner and to otherwise hold him up to ridicule before the jury.

Albeit, the consequential affect of such uneven test of credibility upon the issue of "wilfulness" virtually mandated the adverse verdict rendered.

POST-TRIAL PROCEEDINGS

Petitioner thereafter appealed such conviction to the Fifth Circuit Court of Appeals, raising three specific issues, i.e., (1) Error in the trial Court's instruction to the Jury, (2) prosecutorial misconduct during trial, and (3) the existence of a material variance between the charge and proof adduced. *After* the record and briefs in such cause had been filed, Petitioner discovered an exculpatory exhibit which mysteriously surfaced in the court file following its return from the United States Attorney's office, (App. C). The bizarre circumstances of such discovery are reflected in Petitioner's Affidavit filed before such Court (App. D).

As noted, the subject exhibit consisted of a *copy* of an official IRS transcript reflecting both the filing and granting of at least one, and perhaps the most important, of the tax extensions which formed the basis of the factual dispute at trial.[1]

Although Petitioner immediately advised the Court of Appeals as to his discovery, it was not until *after* the entry of such Court's *summary* dismissal of Petitioner's appeal under Rule 21, 510 F.2d 383, (App. E) that Petitioner filed a motion for remand and Petition for

[1]As a result of the unauthorized service of a subpoena on Petitioner's accountant the day prior to trial and a claimed illegal wiretap, the government knew Petitioner was unable to produce extensions for the years 1967, 1970 and 1971. At trial, the government coincidentally conceded the filing of the extensions possessed by Petitioner, but vigorously denied those which Petitioner was unable to produce. The *crux* of such factual dispute centered on the last of the questioned taxable years, i.e. 1971, the existence of which was subsequently discovered, infra.

Rehearing, therein raising for the first time a collateral issue concerning the consequential effect of the subject exhibit. The Circuit Court *refused* to consider either of such motions and accordingly denied the same, specifically holding as follows: (App. F).

> "Appellant also has filed a motion that the case be remanded for evidentiary hearing. The various grounds asserted are raised for the first time on appeal, on petition for rehearing, or in the motion itself, and we will not consider them. The motion is DENIED."

Despite the complete failure and refusal of the Court to consider such matter *on the merits*, the same Fifth Circuit Court of Appeals based its findings in the case at bar, largely on its contention that it had previously "decided" the issues herein on the basis of such undetermined Petition for Rehearing (App. A).

Following remand of Petitioner's original appeal, Certiorari was thereafter taken to this Honorable Court, raising only two issues for consideration, i.e.: (1) error in the trial court's instruction to the jury, and (2) the existence of a fatal variance between the charge and the proof adduced. Such application was thereafter denied by this Honorable Court, 423 U.S. 1014, 96 S.Ct. 446 (1975).

Albeit, during the pendency of such Certiorari proceeding, the Petitioner filed a Motion for New Trial in the District Court under Rule 33, based on newly discovered evidence (App. G). The District Court *summarily denied* such motion *without evidentiary*

hearing (App. H). No traverse or other response to such motion was ever made by the Government.

Again, and despite the fact that *no determination on the merits* had been rendered by the District Court on such motion, *nor hearing had thereon,* the Court of Appeals in the case at bar *relied upon such District Court denial* as a further basis for its contention that the issues contemplated herein had been "decided". (App. A).

Following such *summary* denial, Petitioner then appealed the District Court action to the Fifth Circuit Court of Appeals which once again entered a *summary* judgment of affirmance without hearing pursuant to its Local Rule 18, 526 F.2d 814 (App. I). In its opinion in the case at bar the Circuit Court erroneously relied upon such *summary* disposal of the appeal as an additional basis for its opinion that the issues contemplated herein had previously been "decided" (App. A).

Albeit, and following affirmance of such *summary* denial of Petitioner's Rule 33 Motion for New Trial, the Petitioner, while incarcerated, filed a Petition to Vacate Conviction under 28 U.S.C. 2255 which vastly *differed* from his prior motion for New Trial in both scope and content (App. J). As noted, rather than relying upon the singular ground of newly discovered evidence, Petitioner alleged innumerable constitutional infirmities in his conviction, based upon his claim of unauthorized wiretapping, deliberate suppression of exculpatory evidence and the Government's knowing use of perjurious testimony and false records.[2] Although the sufficiency of such grounds to warrant the vacating of Petitioner's conviction was never challenged, the District Court nonetheless *summarily* dismissed the Petition without *evidentiary hearing.* (App. K) The Petitioner then filed in the District Court a Motion for Rehearing and for vacation of the Order of dismissal which was likewise *summarily* denied by the District Court without hearing (App. L).

[2]Petitioner further claimed that exculpatory exhibits, *other* than that previously discovered and included in his Rule 33 motion had, likewise, been suppressed by the government.

Following such *summary* dismissal, the Petitioner then appealed *both* the original order of dismissal of the District Court as well as its further Order denying his Motion for Rehearing (App. M). As noted, the opinion of the Circuit Court in the case at bar erroneously suggests that Petitioner's appeal was directed only to the denial of his Motion for Rehearing and Vacation of Order dismissing his 2255 Petition (App. A).

Significantly, and for *the third time,* the Circuit Court entered a *summary* judgment of affirmance without hearing pursuant to Local Rule 18, on this last appeal of Petitioner.

Albeit, and notwithstanding that the Circuit Court in the case at bar based its opinion upon the express ground that the issues contemplated herein had previously been "decided", at no time has any hearing whatsoever been accorded to Petitioner thereon, nor has the Government ever heretofore filed any traverse or other response, either admitting or otherwise denying any of the constitutionally impermissible actions as alleged by Petitioner. Indeed, the record convincingly demonstrates that the *last and only* "hearing" ever accorded to Petitioner since the filing of the original Information in the cause was the trial itself, in which Petitioner's conviction was entered.

REASONS FOR GRANTING WRIT

The decision of the Circuit Court in affirming the District Court's *summary* dismissal of Petitioner's Motion to Vacate Conviction without evidentiary hearing, is in conflict with this Court's decision in *Sanders vs. U.S.* (1963) 373 U.S. 1, and is otherwise repugnant to the statutory requirements of 28 U.S.C. 2255.

At the outset, it should be noted that the *sole* thrust of both the Petition filed before this Honorable Court *and* the appeal taken to the Circuit Court circumscribes Petitioner's claim *that he has thus far been totally deprived of any opportunity or hearing to present for determination on the merits, any of the constitutionally impermissible actions of the Government attendant to Petitioner's conviction.*

Contrary to the opinion rendered by the Circuit Court, *none* of the several grounds urged to vacate Petitioner's conviction have ever been heard or determined on the merits, notwithstanding that the sufficiency thereof has never been challenged or put in issue.

With all due respect, it is deemed incredulous that either the Circuit Court or the District Court in the case at bar, could conceivably, after presumed required review of the record, reject in toto, Petitioner's constitutional claims of deliberate suppression of exculpatory evidence, wire tapping, perjury and falsification of records upon the singular and unsupported basis that the same had previously been "decided".

Certainly the record should speak the truth as to such "finding". Suffice it to say that *if* the Government is able to demonstrate in its response to the within Petition the conduct of *any* hearing upon Petitioner's claims or the existence of *any* proceeding in which the same were determined on the merits, the Petitioner would be content to accept, without further proceeding, the travesty of justice attendant to his conviction.

Realistically, if matters of such constitutional magnitude have, in fact, been "decided", there must at least be something in the record to demonstrate the same, beyond the mere terms "Denied" or "Affirmed", which have *summarily* been applied to *every* prior application made by Appellant in connection with his claims.

While noting in its opinion that the Circuit Court alluded to three presumed instances to support its determination that Petitioner's constitutional claims had previously been "decided", i.e., in "Petition for Rehearing", "Motion for New Trial", and "direct appeal therefrom" such reliance by the Court is totally repugnant to the record, viz:

(1) The record demonstrates that the cited "Petition for Rehearing" was not even filed *until after* the Circuit Court had summarily affirmed Petitioner's conviction on his original appeal.[3] Albeit, because the previously suppressed IRS transcript was discovered only by pure chance *during* Petitioner's appeal and no issue concerning the same had previously been raised,

[3]Summary judgment of Affirmance was entered *February 25, 1975;* Petition for Rehearing was filed *April 11, 1975.*

the Circuit Court expressly refused to even consider such matter, holding: (App. F)

> "Appellant also has filed a motion that the case be remanded for evidentiary hearing. The various grounds asserted are raised for the first time on appeal, on petition for rehearing, or in the motion itself, and we will not consider them. The motion is DENIED."

(2) The record further demonstrates that Petitioner's Rule 33 "*Motion for New Trial*" was *summarily* denied by the District Court, without evidentiary hearing, and indeed, without even, Government response thereto. (App. H).

(3) Similarly, and with respect to the "*direct appeal therefrom*" the record otherwise reflects that the Circuit Court *summarily* affirmed such denial by the District Court without hearing. 512 F.2d 814. (App. I).

Ergo, neither in the three instances cited in the Circuit Court's Opinion, nor elsewhere in the record is there found *any* basis whatsoever which could even remotely suggest that any of Petitioner's claims had previously been "decided" in the manner as mandated by 28 U.S.C. 2255.

Certainly, where as in the instant cause, each of the several grounds raised are sufficient per se, to require the vacating of Petitioner's conviction, neither the Circuit Court nor the District Court could possibly have previously "decided" such vital issues on the pleadings and briefs filed by the parties". *Fuentes vs. U.S.*, (C.C.A. 5th, 1972) 455 F.2d 911.

Significantly, the 9th Circuit in *Wallace vs. U.S.*, (C.C.A. 9th, 1972) 457 F.2d 547, decisively held that "since Appellant did not have an evidentiary hearing on his earlier petition, denial was not on the merits of his claim."

In the somewhat analogous case of *Sanders vs. U.S.*, supra, this Honorable Court interpreted the provisions of a Section 2255 application as the same related to prior proceedings seeking collateral relief. In *Sanders*, the Petitioner filed two motions under Section 2255 after a conviction on a bank robbery charge. Both motions were denied by the trial court and affirmed by the court of appeals without hearing. This Court granted certiorari and reversed the court of appeals, holding that the sentencing court *should have granted a hearing on the second motion.* Subpart A of this Court's opinion particularly addresses itself to the question of successive motions on grounds previously heard and determined, viz:

> "Controlling weight may be given to denial of a prior application for federal habeas corpus or Section 2255 relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application. (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application." (at 1077).

Although in such instance, this Court did not specifically refer to a Rule 33 Motion for New Trial as presented in the case sub judice, its discussion of successive motions in general terms certainly suggests that

the rationale of the case applies to *all* successive motions for federal collateral relief:

> "No matter how many prior applications for *federal collateral relief* (emphasis added) a prisoner has made, the principle elaborated in Subpart A, supra, cannot apply if a different ground is presented by the new application. So, too, it cannot apply if the same ground was earlier presented but not adjudicated on the merits. In either case, full consideration of the merits of the new application can be avoided only if there has been an abuse of the *writ or motion remedy; and this the government has the burden of pleading.*" (at 17).

This court went on to set forth three criteria for finding successive motions to be res judicata:

> "By ground, we mean simply a sufficient legal basis for granting the relief sought by the applicant . . . identical grounds may often be proved by different factual allegations. So also, identical grounds may ofter be supported by different arguments . . . or vary in immaterial respects . . . Should doubts arise in particular cases as to whether two grounds are different or the same, they should be resolved in favor of the applicant (at 1077.)

Concerning motions summarily denied, this court in *Sanders* specifically held:

> "The prior trial must have rested on the merits of the ground presented in the subsequent application. . . . This means that if factual issues were raised in the prior application, and it was not denied on the basis that the files and records conclusively resolved these issues, an evidentiary hearing must be held." (at 1077).

Since a Rule 33 Motion is deemed to be a motion for federal collateral relief, and this court in *Sanders* made specific reference to motions for federal collateral relief, the rationale of such case should apply to the situation presented in the case at bar, wherein a Rule 33 Motion for federal collateral relief was followed by the 2255 Motion filed herein.

In cases involving successive Rule 33 motions, such as *Saunders vs. U.S.* (D.C. Cir. 1951) 192 F.2d 409, and *Wilson vs. U.S.*, (8th Cir. 1948) 166 F.2d 527, the *only time* that successive motions have been found to be res judicata was in instances where *a full hearing had been held* on the first motion, and the second motion was based *on identical grounds.* As noted, the lower court cases involving successive Section 2255 motions have reiterated the findings of this Court in *Sanders.*

In *Wallace vs. U.S.*, (8th Cir. 1949) 174 F.2d 112, the Eighth Circuit Court of Appeals reversed the denial of successive 2255 motions by the District Court, stating:

> "The action of the District Court upon the joint motion of Wallace and Story . . . to vacate their sentences cannot, we think, be regarded as res judicata of Wallace's present motion, since the record fails to show that the prior mo-

tion was heard upon the merits or that any formal order denying it was entered." (at 1177).

Also, in *Andrews vs. U.S.*, (5th Cir. 1961) 286 F.2d 829, the court found that a prisoner was entitled to a hearing upon a second motion attacking his sentence. In *Andrews* there had been no hearing on an earlier motion and the files and records of the court did not conclusively show that the prisoner was entitled to no relief. Further in *Haynes vs. Ciccone*, (W.D. Missouri, 1965) 248 F. Supp. 898, the Court held:

> "If the hearing on petitioner's prior motion under Section 2255 was not a full and fair hearing resulting in reliable findings, successive applications for relief under Section 2255 may be filed by the petitioner in the committing court . . . and rulings thereon appealed until a full and fair hearing and a lawful decision has been rendered, and until the ends of justice would not be served by reaching the merits of a subsequent application. (At 902).

Further, in *Saville vs. U.S.* (1st Cir. 1971) 451 F.2d 649, the First District Court of Appeals found that the district court had erred in relying on prior 2255 motion denials in its refusal to grant a hearing on a successive motion. The court stated that:

> ". . . prior refusal to discharge a prisoner on a like application can be given controlling weight only if it was an adjudication on the merits of the ground presented." (at (650)

In *Holt vs. U.S.*, (8th Cir. 1962) 303 F.2d 791, the Eighth Circuit Court of Appeals considered the propriety of both a Rule 33 motion and a Section 2255 Petition. As noted therein, while an appeal of a conviction for narcotic violations was pending, the defendant in *Holt* filed a Rule 33 Motion for new trial. The District Court summarily dismissed the motion because it felt that it was without jurisdiction to entertain the motion for new trial while an appeal of the conviction was pending. After the conviction had been affirmed by the court of Appeals, the appellant filed a motion under Section 2255 and in the alternative, reiterated his claim for a new trial under Rule 33. The Court of Appeals vacated the order of the district court dismissing the motion for new trial and remanded the cause for purpose of consideration of the Rule 33 motion along with the Section 2255 motion. The Court determined that it was necessary to conduct a *full* hearing on both of these motions — though subsequently denying the same on the merits.

It is accordingly submitted from the foregoing that where no hearing was had on a prior application for federal collateral relief, a subsequent 2255 motion embracing either the same or different grounds, *must* be heard and determined by the trial court — unless such latter motion conclusively shows that movant is entitled to no relief.

In *Kyle vs. U.S.* (CCA 2nd, 1961) 297 F.2d 507, the Second Circuit Court of Appeals considered a situation virtually on "all fours"' with the case at bar. In such case, the District Court denied a Section 2255 Petition where it was claimed that the Government had "sup-

pressed" certain let'ers of exculpatory value. In such instance,

> "The Government opposed the motion on the grounds that petitioner should have "raised and pushed" the issue earlier, that the copies of the letters would not have helped him in any event, and that if he had deemed them essential, he could have obtained the originals from Salzburg. Chief Judge Bruchhausen denied the motion with an oral opinion, rendered after argument but *without an evidentiary hearing.*" (Emphasis supplied)

In further alluding to the factual situation of such cause, the Court observed:

> "Here the appearance in the Government's files of the letters, the possession of which it had disclaimed at and after the trial, sufficiently altered the situation since the denial of the first motion to demand evidentiary inquiry . . ."

In noting that no evidentiary hearing had been held, the Court in *Kyle* remanded the cause and directed the conduct of such hearing if only to determine whether the Government's failure to disclose was wilful or negligent.

In applying such principle to the case at bar, it is noted that the Government denied the existence of certain extensions to file tax returns which Petitioner claimed had been both requested and granted. Aside from the exculpatory effect of such extensions, this

direct conflict in testimony materially and adversely affected Petitioner's credibility. Subsequent discovery made during the course of original appeal reflected not only the existence of at least one of the extensions claimed, but the Government's knowing possession and suppression thereof.

In affidavits filed before the Court (App. D and N) *both Petitioner and Petitioner's trial counsel, E. David Rosen, swore that the existence of such exculpatory exhibit was completely unknown to them at time of trial and further, that the Government had at no time disclosed or supplied the same.*

Moreover, and while Petitioner's Rule 33 Motion for New Trial made reference *only* to such singular extension, the 2255 Petition filed herein claimed both the existence and suppression of *other* exculpatory exhibits and extensions as well.

Significantly, neither the District Court nor the Circuit Court *ever entered* a finding that "the ends of justice would not be served by reaching the merits of the subsequent application" as required in *Sanders*, supra. Nor indeed, has either the Circuit Court or the District Court ever required the Government to either admit, deny, or otherwise respond to any of Petitioner's claims of Government misconduct . . . which, as of this date, the Government has totally failed to do.

Ergo, and aside from the absence of any predicate in the record to support the summary rejection of Petitioner's claims, even the authorities cited in the Circuit Court's opinion are viewed to be totally inapplicable, viz:

In *Del Genio vs. U.S.*, 352 F.2d 304 (5 Cir. 1965), the Court specifically determined that Petitioner's prior application had been given "an exhaustive evidentiary hearing covering the identical matters again asserted in the Section 2255 Petition".

In *Blackwell vs. U.S.*, 429 F.2d 514 (5 Cir. 1970), the Court specifically determined there was no factual predicate in the record to support Petitioner's Section 2255 claim that his confession had been "coerced" since no such confession had ever been received in evidence at trial of the cause.

It is significant to note that during proceedings on his 2255 motion to vacate, the Petitioner made the following unanswered challenge!

". . . to demonstrate from the record the existence vel non of any of the following:

(a) any pleadings or instruments wherein the Government either admits, denies or otherwise responds to the constitutionally impermissible claims raised herein by Petitioner,

(b) any proceeding or hearing heretofore held in the cause whereat any of the evidentiary matters reflective of Petitioner's claims was considered by this or any other court.

(c) any order, ruling or directive wherein it might appear that a determination of Petitioner's claims was rendered on their respective merits."

Neither the Government nor the District court met such challenge, apparently for the simple reason that none of the foregoing matters do, in fact, exist.

Petitioner accordingly submits that absent any prior determination of the constitutional grounds herein urged on their respective merits, the statutory requirements as prescribed by 28 U.S.C. 2255, make requisite the granting of an evidentiary hearing upon Petitioner's Motion to Vacate. Certainly, if, at such evidentiary hearing, the Petitioner can meet the requisite burden of proof supportive of his constitutional claims, he would clearly be entitled to the consequent vacating of his conviction. Only then, could the Petitioner be said to have had his "day in Court" in the manner envisioned by the late and revered Justice Black, who, in *Berman vs. United States*, (1964) 378 U.S. 530, admonished:

"The Criminal Rules were framed with the declared purpose of ensuring that justice not be thwarted by those with too little imagination to see that procedural rules are not ends in themselves, but simply means to an end; the achievement of equal justice for all. I have no doubt that the disposition of this case would have been very congenial to the climate of Baron Parke's day. I confess, however, that I am uncomfortable with the notion that courts exist to fashion and preserve rules inviolate instead of to apply those rules to do justice to litigants."

Needless to state, the consistent refusal on the part of the lower courts to even allow a hearing upon Petitioner's constitutional claims is, to the absolute disgrace of our judicial system, reminiscent of "Watergate".

Certainly, and to the extent that Petitioner has been denied such a hearing, his constitutional right of equal protection under the law must be said to have been violated. Similarly, and with respect to the summary rejection of such claims, his additional constitutional right of due process was effectively denied.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals.

Respectfully submitted,

LOUIS VERNELL,
In Proper Person

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the above and foregoing was mailed this 13th day of February, 1978, to:

The Solicitor General
Department of Justice
Washington, D.C. 20530

LOUIS VERNELL

in the

Supreme Court
of the
United States

NO. 77-1145

LOUIS VERNELL, JR.,
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UNITED STATES OF AMERICA,
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Appendix to
Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Appendix A

Louis VERNELL, Jr.,
Petitioner-Appellant.

v.

UNITED STATES of America,
Respondent-Appellee.

No. 76-3929
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Sept. 21, 1977.

Federal prisoner petitioned for postconviction relief. The United States District Court for the Southern District of Florida at Miami, Charles B. Fulton, J., denied motion for rehearing and vacation of order dismissing petition and petitioner appealed. The Court of Appeals held that relief was properly denied where the grounds raised in the petition had been previously decided by the district court and the Court of Appeals in petition for rehearing, motion for new trial, and direct appeal therefrom.

Affirmed.

Criminal Law — 997.7

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*Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al., 5 Cir. 1970, 431 F.2d 409, Part I.

Postconviction relief was properly denied where grounds raised in prisoner's petition had been previously decided by both the district court and the Court of Appeals in petition for rehearing, motion for new trial, and direct appeal therefrom. 28 U.S.C.A. §2255.

Appeal from the United States District Court for the Southern District of Florida.

Before THORNBERRY, RONEY and HILL, Circuit Judges.

PER CURIAM:

Louis Vernell appeals from the denial on September 7, 1976, of his Motion for Rehearing and Vacation of an Order dismissing his §2255 petition. The Motion for Rehearing and Vacation of an Order requests reconsideration of issues which have been raised and reviewed in earlier motions and appeals. Vernell still asks that his conviction be overturned because of the same "newly discovered evidence" which was before this court at the time of his first direct appeal and because of the same perjured testimony and alleged wiretap which was before this court on the appeal from the denial of the motion for a new trial. The grounds raised in the instant §2255 petition have been previously decided by both the district court and this court in petition for rehearing, motion for new trial, and the direct appeal therefrom. Accordingly, we AFFIRM. See, e.g., Blackwell v. United States, 429 F.2d 514 (5 Cir. 1970); Del Genio v. United States, 352 F.2d 304 (5 Cir. 1965).

Appendix B

TESTIMONY OF PETITIONER,
TRIAL TRANSCRIPT, Page 148

Q Now, you heard the testimony of Mr. McDaniel?
A Yes, sir.

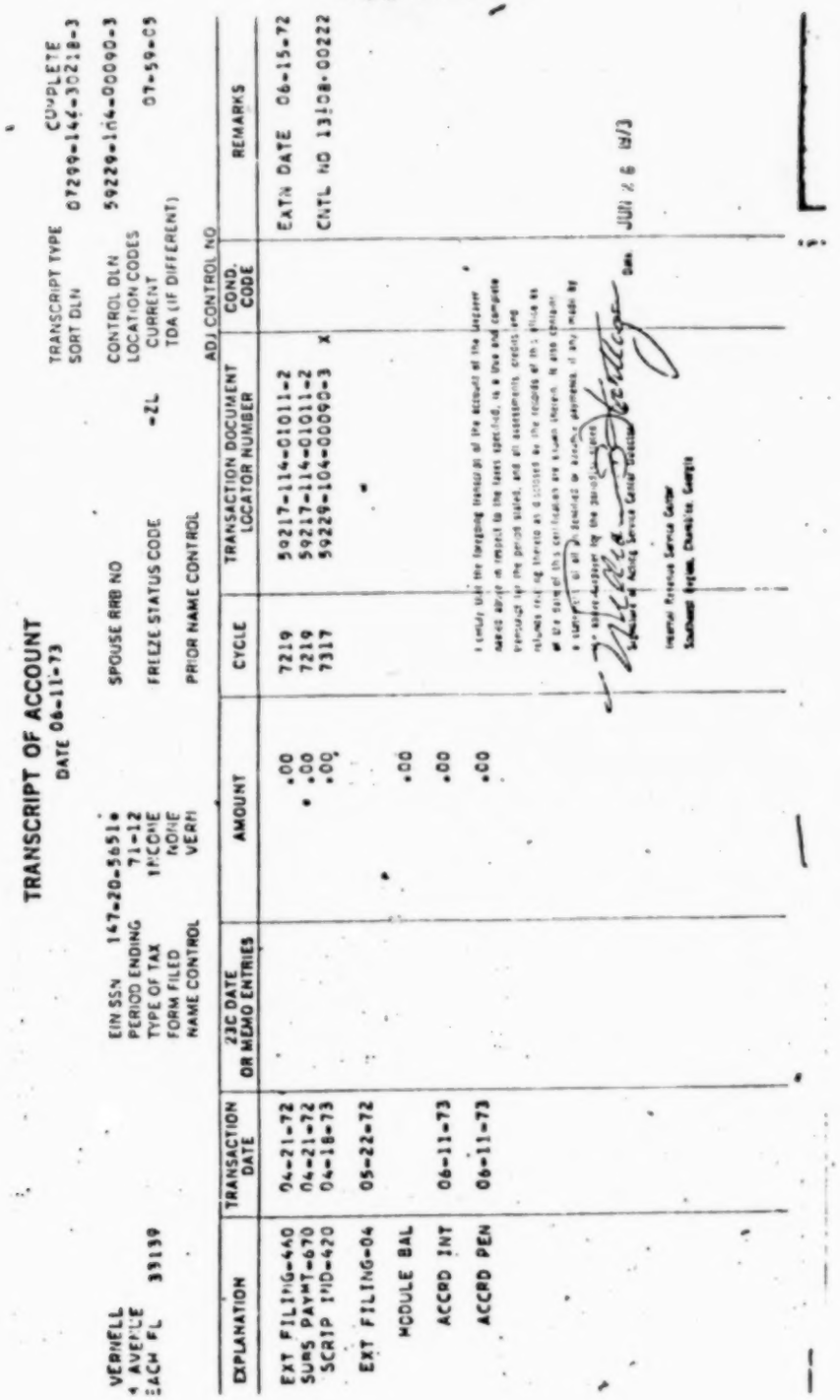
Q Have you examined Government Exhibit No. 1 — No. 8?
A Relative to my extension applications?

Q Yes, sir.
A Yes.

Q They don't show that you filed extensions for all those years, do they?
A They are incorrect.

Q You believe they are incorrect?
A I know they are incorrect.

Appendix C



TRANSCRIPT OF ACCOUNT
DATE 06-11-73

TRANSCRIPT TYPE: COMPLETE
SORT DLN: 07299-144-30218-3

SPOUSE RRB NO
CONTROL DLN: 59229-104-00090-3
LOCATION CODES
FREEZE STATUS CODE: -ZL
CURRENT TDA (IF DIFFERENT): 07-59-05
PRIOR NAME CONTROL
ADJ CONTROL NO

VERNELL
AVENUE
EACH FL 33139

EIN SSN 147-20-5651
PERIOD ENDING 71-12
TYPE OF TAX INCOME
FORM FILED NONE
NAME CONTROL VERN

EXPLANATION	TRANSACTION DATE	23C DATE OR MEMO ENTRIES	AMOUNT	CYCLE	TRANSACTION DOCUMENT LOCATOR NUMBER	COND. CODE	REMARKS
EXT FILING-440	04-21-72		.00	7219	59217-114-01011-2		EATN DATE 06-15-72
SUBS PAYMT-670	04-21-72		.00	7219	59217-114-01011-2		
SCRIP PMD-420	04-18-73		.00	7317	59229-104-00090-3	X	CNTL NO 13108-00222
EXT FILING-04	05-22-72						
MODULE BAL			.00				
ACCRD INT	06-11-73		.00				
ACCRD PEN	06-11-73		.00				

I certify that the foregoing transcript of the account of the taxpayer named above in respect to the taxes specified, is a true and complete transcript for the periods stated, and all assessments, credits and refunds relating thereto as disclosed by the records of this office as of the date of this certificate are shown thereon. It also contains all of the declared or assessed payments, if any, made by the taxpayer for the periods stated.

Internal Revenue Service Center
Southeast Region, Chamblee, Georgia

JUN 26 1973

Appendix D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee

vs

LOUIS VERNELL, JR.
Defendant-Appellant

STATE OF FLORIDA;
: ss
COUNTY OF DADE :

AFFIDAVIT

Louis Vernell, Jr., being first duly sworn, deposes and states as follows:

I

That he is the Defendant-Appellant in the above entitled cause and that he is personally familiar with all matters reflected herein.

II

That following the filing of Affiant's original appeal and pursuant to his request, the complete record in the lower court, including all exhibits, was remitted to Affiant by the Clerk of the above entitled Court as an incident to the filing of Affiant's Brief of Appellant.

III

That upon completion of such brief and at the request of the office of the U.S. Attorney, such record and all exhibits were thereafter physically delivered by Affiant to the office of the U.S. Attorney for its utilization in filing of the brief of Appellee.

IV

That despite Affiant's simultaneous request that such record and exhibits be returned to Affiant upon the completion of Appellee's brief so as to enable the filing of a Reply Brief by Appellant, the U.S. Attorney's office inadvertently or otherwise returned the same directly to the office of the Clerk of the above entitled Court, rather than to Affiant.

V

That, in deeming it necessary that the Exhibit File be further utilized in the preparation and filing of a Reply Brief of Appellant, Affiant again requested the Clerk of the above entitled Court (per letter attached) to remit such exhibits to him following their respective use and transmittal by the U.S. Attorney.

VI

That, in compliance with the request, the Clerk of the above entitled Court did again remit the Exhibit File to Affiant, whereupon Affiant discovered and ascertained for the first time, the existence of Exhibit "A" annexed to Affiant's Motion for New Trial which reflected both the filing and granting of Affiant's application

for Extension of Time to file his tax return for the year 1971; such exhibit being found among and annexed to, one of the other Government exhibits which had actually been received and admitted into evidence during trial of the cause.

VII

That Affiant affirmatively states that such Exhibit "A" was never previously contained with in the original Exhibit File as furnished Affiant by the Clerk of the above entitled Court, nor was the same present at the time of Affiant's delivery of such file to the office of the U.S. Attorney, nor further, was such Exhibit "A" at any time made a part of the record at and during trial proceedings.

VIII

That accordingly, and until the second aforementioned delivery of transmittal of the Exhibit File to Affiant by the Clerk of the above entitled Court, the instrument designated as Exhibit "A" was never prior thereto, in the possession of your Affiant nor did he ever previously see or observe the same, nor indeed, did Affiant have any prior knowledge as to its existence.

FURTHER AFFIANT SAITH NAUGHT.

_____

LOUIS VERNELL, JR.

Subscribed and sworn to before me
this ___ day of August, 1975.

Offices of
Louis Vernell
Attorney and Counselor at Law

December 31, 1974

Clerk of the Circuit Court of Appeals
600 Camp St.
New Orleans, La. 70130

Att: George G. Bauer, Jr.

Re: USA vs. Vernell
Case No. 74-3351

Dear Mr. Bauer,

Inadvertently Government counsel returned to your offices the record including exhibits which you had sent me at my request.

As you were doubtless informed, I provided the record to Government counsel upon completion of my brief so as to assist in the preparation for the Government's brief.

In attempting to reply to the Government's brief, I find it necessary that I again impose upon you for the return of the exhibits and request a short extension of time to file an appropriate reply brief.

Government counsel indicated that because of the inadvertent remittance of the record, rather than returning same to this office, it had no objection to extending the time for the reply brief.

Thanking you for your indulgence and extending to you and your office my best wishes for the new year, I remain,

Cordially,

LOUIS VERNELL

LV:bs

Appendix E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-3351
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

LOUIS VERNELL, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

(February 25, 1975)

Before BROWN, Chief Judge, GODBOLD and GEE, Circuit Judge.

PER CURIAM: IT IS ORDERED that appellant's motion for leave to supplement the appendix is GRANTED.

AFFIRMED. See Local Rule 21.[1]

*Rule 18, 5 Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

[1]See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

Appendix F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 74-3351

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

LOUIS VERNELL, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

(June 24, 1975)

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC Before BROWN, Chief Judge, GODBOLD and GEE, Circuit Judges. PER CURIAM:

This appeal, in which the appellant is a practicing attorney, is from a conviction for willful failure to file federal income tax returns. We affirmed the conviction by a Rule 21 decision, and appellant has filed a petition for rehearing and for rehearing en banc.

As one of the grounds for the petition for rehearing en banc appellant, without making unequivocal allegations, suggests the possibility that extraneous and prejudicial influence may have tainted or remotely affected this court in the consideration of his appeal. He refers to statements possibly made to Chief Judge Brown of this court, by telephone, by William L. Taub, a client or former client of appellant, with whom appellant states he had come to have sharp and antagonistic differences. According to appellant, statements by Taub, if made at all, may have alluded to purported improper actions by appellant in matters unrelated to the conviction on appeal.

Chief Judge Brown has filed with the clerk of this court a written statement, a copy of which has been sent to appellant, stating that he had two telephone conversations with Taub relating to a request by Taub for a stay order in a civil case pending in the United States District Court for the Southern District of Florida; that at the time of the conversations Chief Judge Brown did not know that the appellant then was or had been Taub's attorney in the case pending in the Southern District of Florida; and that in the conversations Taub said nothing about appellant, adverse or otherwise.

Our Rule 21 opinion affirming appellant's conviction was issued February 25, 1975. On April 11, 1975 appellant filed his petition for rehearing, having been granted additional time based upon his representation that he did not receive a copy of the opinion. We have independently examined the file of this court in the matter of Taub's request for a stay order, Twentieth Century Fox Film Corp. vs. Saudco, Ltd. and Taub, No. 75-1531. A stay order was denied by this panel on March

10, 1975. While appellant does not refer to it in his petition, we note that on March 19, 1975, before appellant filed his petition for rehearing in the instant case, Taub by a telegram to the Clerk of this court, requested reconsideration of the denial of the stay order in No. 75-1531. In the telegram Taub stated: "Louis Vernell failed to advise me of this order [the order denying a stay] and continues totally neglectful of our legal interest in this matter."

A copy of the telegraphic petition was sent to each member of this panel, and the panel denied the petition. Thus in acting at this time on the instant petition the panel takes cognizance of Taub's telegraphic statement concerning appellant. We attach no weight or significance to this dispute between appellant and Taub. The content of Taub's statement is wholly irrelevant to appellant's conviction for failure to file federal tax returns. The fact that we have been informed that such a dispute exists does not disqualify any member of this panel from reviewing and acting upon appellant's petition (or his motion to remand described below).

The petition for rehearing is DENIED. No member of this panel or judge in regular active service having requested that the court be polled on rehearing en banc, the petition for rehearing en banc is DENIED.

Appellant also has filed a motion that the case be remanded for evidentiary hearing. The various grounds asserted are raised for the first time on appeal, on petition for rehearing, or in the motion itself, and we will not consider them. The motion is DENIED.

Appendix G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 74-79-CR-CF

UNITED STATES OF AMERICA
Plaintiff

vs

LOUIS VERNELL, JR.
Defendant

MOTION FOR NEW TRIAL

Louis Vernell, Jr., Defendant, appearing pro se, respectfully moves this Honorable Court, pursuant to Rule 33 of the Federal rules of Criminal Procedure, to grant a new trial in the within cause and to accordingly vacate and set aside the conviction and sentence as entered herein, showing as grounds and reasons therefor, as follows:

1. That Defendant was heretofore convicted after trial by jury, of the misdemeanor offense(s) of failure to file income tax returns as proscribed by Section 7203, Internal Revenue Code, Title 26, Code 7203.

2. That subsequent to the entry of judgment and during the process of appeal taken, the Defendant did ascertain and otherwise discover that Defendant's trial was marked with constitutional infirmities and unfairness to such an extent as to have effectively deprived

the Defendant from receiving a fair and impartial trial; that, with due and utmost respect for this Honorable Court, the Defendant submits that such matters were of such a nature as to have been unknown and undisclosed to both the Court and to the Defendant at and during trial proceedings.

3. That accordingly and as a result of newly discovered evidence, the Defendant submits that in contravention of his constitutional rights, the Government failed to disclose and otherwise suppressed evidence of an exculpatory nature; that, further, the Government offered into evidence in the cause, false and erroneous testimony and records; that as reflected infra, such actions and conduct, on the part of the Government, not only destroyed Defendant's credibility before the jury, but otherwise materially affected the outcome of the cause; viz:

(a) At trial, all elements of the subject offense(s) were duly stipulated and agreed to, save and except for the issue of wilfulness, which constituted the sole triable issue in the cause; that as an integral part thereof, the Defendant sought to demonstrate that during each of the subject years for which he was charged, he had made timely application for extension of time to file the required tax returns and that the same, on occasion, had been granted to him; that with the exception of such factual matter(s), the Government either conceded or otherwise failed to refute virtually all other facts and circumstances alluded to by the Defendant in his trial testimony.

(b) That as reflected in the record, the focal point of Defendant's trial and the very crux of the factual dis-

pute, circumscribed Defendant's claim that he had filed an application for extension for the year 1971. In denying Defendant's claim, Walter McDaniel testified on behalf of the Government "as the personal representative of the District Director" that not only had the Defendant not made an application for such, but specifically, none had been granted to him. In addition, the Government presented into evidence records which it represented reflected "all of the transactions of the taxpayer"; such records indicating that Defendant had neither filed nor been granted an extension for such year.

4. That Defendant would now show that both the testimony of such witnesses, as well as the records presented into evidence, were false and erroneous as reflected in the annexed Exhibit "A", which was discovered long after trial of the cause; that in truth and in fact, the Government had the subject documents and information in its possession long prior to trial of the cause and wholly failed to disclose or make the same available to Defendant.

5. That notwithstanding, and as reflected in the record, the Government utilized such false and erroneous testimony and records not only as direct evidence in the cause, but further employed the same in a concerted effort to impeach the testimony of the Defendant. Indeed, the Government actually pitted the very credibility of the Defendant against such incompetent evidentiary matter, viz:

"Vernell — Cross

Q Now, you heard the testimony of Mr. McDaniel?

A Yes, sir.

Q Have you examined Government Exhibit No. 1 — No. 8?

A Relative to my extension applications?

Q Yes, sir.

A Yes.

Q They don't show that you filed extensions for all those years, do they?

A They are incorrect.

Q You believe they are incorrect?

A I know they are incorrect." (TR 148)

6. That Defendant further submits that the Government further knew prior to the commencement of the trial, that the Defendant did not have copies or other evidence reflecting his application for extension for the year 1971; that such information was imparted to the Government on the day prior to trial as a result of telephone conversations between the Defendant and his accountant and attorney, which Defendant submits, upon reliable information, were illegally monitored.

7. That such actions and conduct by the Government in suppressing evidence of an exculpatory nature

and in proferring false and erroneous testimony and records into evidence, served to deny to the Defendant his constitutional right to a fair and impartial trial and otherwise served to preclude the rendition of a fair and impartial verdict.

8. That such newly discovered evidence further serves to reflect the presence of a material variance between the information and proof adduced as to matters of substance; such variance being of sufficient nature as to vitiate the judgment of conviction entered.

9. That Defendant submits that by reason of the foregoing a new trial is required in the interest of justice in the cause.

WHEREFORE, Defendant respectfully moves this Honorable Court to conduct an evidentiary hearing upon the matters included herein and to thereupon vacate and set aside the judgment and sentence as entered in the within cause. Defendant further prays that this Honorable Court will dismiss the within cause or, alternatively, grant him a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above was hand-delivered this 7th day of August, 1975, to Robert W. Rust, Esq. 300 Ainsley Building, Miami, Florida.

LOUIS VERNELL, JR.
100 S. E. Second Street
Miami, Florida 33131

Appendix H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. -74-79-Cr-CF

[FILED AUG 8 1975]

UNITED STATES OF AMERICA,

vs.

LOUIS VERNELL, JR.,
Defendant.

ORDER

This cause came before the Court upon the defendant's motions to set bail, for new trial, and for mitigation and reduction of sentence. The Court has carefully considered the motions and it is thereupon

ORDERED AND ADJUDGED that defendant's motions to set bail, for new trial, and for mitigation and reduction of sentence are denied.

DONE and ORDERED at West Palm Beach, Florida, this 8 day of August, 1975.

/s/ Charles B. Fulton
Chief Judge

cc: U.S. Attorney
Louis Vernell, Jr., Esq.
Probation
U.S. Marshal

Appendix I

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 75-3128
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

LOUIS VERNELL, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

(January 21, 1976)

BEFORE BROWN, Chief Judge, GODBOLD and GEE, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

*Rule 18, 5 Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409. Part I.

[1]See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

Appendix J

MOTION PURSUANT TO 28 U.S.C. 2255
ATTACKING SENTENCE IMPOSED BY COURT
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[FILED Illegible]

CASE NO. 76-439-Civ CF

IN RE: 74-79-CR-CF

LOUIS VERNELL,

Petitioner

VS

UNITED STATES OF AMERICA,

Respondent.

INSTRUCTIONS

(Read carefully — must be filed in triplicate)

For this motion to receive consideration by the District Court, all copies must be legibly handwritten or typewritten, signed by the Petitioner, notarized, and set forth in concise form the answer to each applicable question. If necessary, Petitioner may finish his answer to a particular question on the reverse side of the same page, or on an additional blank page, clearly indicating to which question such continued answer refers.

Since every motion under this Section must be sworn to under oath, any false statement of a material fact herein may serve as the basis of prosecution and conviction for perjury. Extreme care should, therefore, be exercised to assure that all answers are absolutely true and correct.

Upon completion, the original and both copies must be returned to the: Clerk, United States District Court, Southern District of Florida, P.O. Box 669, Miami, Florida, 33101, together with the $15.00 filing fee for commencing this proceeding or, if applicable, an affidavit in forma pauperis sworn to under oath.

1. Place of present detention .....Eglin Air Force Base, Federal Prison Camp

2. Name and location of court, and Judge who imposed sentence .....
U.S. District Court, Southern District, Miami Division
Hon. Charles Fulton

3. With reference to your conviction, list the following:

   (a) Case No.....74-79-CR-CF

   (b) Offense . Failure to timely file tax returns

   (c) Title & Section of U.S. Code 26 USC 7203

   (d) Sentence imposed 9 months-mitigated to 5 months

(e) Date sentence imposed ..... July 18, 1974

4. Check the nature of your plea prior to a finding of guilty:
Guilty .. ; Not Guilty X ; Nolo Contendere ...

5. If your plea was not guilty, check if you were found guilty by:
a Jury X a Judge without a Jury .

6. Did you appeal the judgment of conviction?
Answer: Yes

7. If you answered "yes" to Question Number 6 above, list:

(a) Appellate Court ... Fifth Circuit Court of Appeals

Date of Appeal ..... July 19, 1974

Result .....Affirmed-per Rule 21

Date of result ..... July 7, 1975

Citations of written opinions or orders entered pursuant thereto None-510 Fed 383

(b) Appellate Court .. Supreme Court of the United States

Date of Appeal ..... August 30, 1975

Result .....Certiorari denied

Date of result ..... December 8, 1975

Citations of written opinions or orders entered pursuant thereto .. None 18 CRL 4098

8. Were you represented by an attorney during the course of your:

(a) Arraignment and plea?..... Yes

Name of attorney ..... E. David Rosen

Address of attorney ..Biscayne Building, Miami, Fla.

Was attorney Court appointed? .....No

(c) Sentencing? ..... Yes

Name of Attorney .....same

Address of attorney .....same

Was attorney Court appointed? .....No

(d) Appeal (if applicable)?..... No — Pro Se

Name of attorney .....

Address of attorney .....

Was attorney Court appointed? .....

(e) Preparation, presentation or consideration of any other post-sentence, petitions, with respect to this conviction? No — Pro Se

Name of attorney .....

Address of attorney .....

Was attorney Court appointed? .....

9. State concisely all the grounds on which you now base your allegation(s) that sentence imposed upon you is invalid. Any ground not set forth in this motion will not be hereafter considered.

(a) Ground alleged — Wire tapping and illegal monitoring of privileged telephone conversations between Petitioner and his attorney and accountant.

State facts (concisely) which support ground (a) hereinabove — See accompanying Petition

(b) Ground alleged — Deliberate suppression of exculpatory evidence and the knowing use by the Government of perjurious testimony and false records.

State facts (concisely) which support ground (b) hereinabove — See accompanying Petition

(c) Ground alleged —

State facts (concisely) which support ground (c) hereinabove —

10. Has any ground set forth in Question No. 9 hereinabove been previously presented to this or any other Federal Court by way of motion under Section 2255 of Title 28, U.S.C., or petition for writ of habeas corpus, or any other applications, petitions or motions?

Answer: Rule 33, FRCP

11. If you answered "yes" to Question No. 10 above, list:

(a) Grounds previously presented Petitioner's Rule 33 motion was based upon the post trial discovery of one of the items suppressed; such motion accordingly considered the Gov't's suppression thereof and the falsity of the Gov't's testimony and records with respect thereto.

Nature of proceeding The motion was summarily denied without evidentiary hearing, Government response or determination on the merits.

Name of Court ..... U.S. District Court, Southern District, Miami Division

Date ..... August 7, 1975

(b) Grounds previously presented .....

Nature of proceeding .....

Name of Court .....

Date .....

(c) Grounds previously presented .....

Nature of proceeding .....

Name of Court .....

Date .....

12. Have you previously filed any other motions under Section 2255 of Title 28, U.S.C., petitions for writ of habeas corpus, or any other applications, petitions or motions with respect to this conviction?

Answer: None except the Motion filed under Rule 33 FRCP.

13. If you answered "yes" to Question No. 12 hereinabove, list with respect to each such application, petition or motion:

(a) Name of Court .....

Location of Court .....

Nature of application .....

Result .....

Date of result .....

Citations of written opinions or orders entered pursuant thereto .....

(b) Name of Court .....

Location of Court .....

Nature of application .....

Result .....

Date of result .....

Citations of written opinions or orders entered pursuant thereto .....

(c) Name of Court .....

Location of Court .....

Nature of application .....

Result .....

Date of result .....

Citations of written opinions of orders entered pursuant thereto .....

14. If you lack the statutory filing fee ($15.00) and are seeking leave to proceed in forma pauperis, have you carefully read and completed the sworn affidavit on Page 7? (Any false statement is punishable by law.)

Answer: .....

/s/Louis Vernell
(Signature of Petitioner)

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN
DISTRICT OF FLORIDA, MIAMI DIV.

CIVIL ACTION NO.

LOUIS VERNELL,
Petitioner

vs

UNITED STATES OF AMERICA
Respondent

PETITION TO VACATE CONVICTION PURSUANT TO 28 U.S.C. 2255

COMES NOW the Petitioner, LOUIS VERNELL, and pursuant to 28 U.S.C. 2255, states as follows:

I.

On July 18, 1974 Petitioner was convicted of the offense of failure to timely file income tax returns in violation of 26 U.S.C. 7203. Petitioner was thereupon sentenced to a term of nine (9) months imprisonment and a fine in the amount of $5,000.00 (Exhibit A attached).

II.

Petitioner appealed his conviction to the Fifth Circuit Court of Appeals, which affirmed the same pursuant to its Local Rule 21, Vernell v. U.S., 510 Fed 2d 383, Cert. denied December 8, 1975, U.S. 18 CrL4098.

Following issuance of mandate, Petitioner filed a Motion for New Trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure based on newly discovered evidence; this motion was summarily denied without evidentiary hearing or government response. Petitioner appealed this denial to the Fifth Circuit Court of Appeals, which affirmed the same again pursuant to its Local Rule 21, U.S. v. Vernell, Fed 2.

III.

Petitioner submits that despite the foregoing, his conviction and present confinement are constitutionally infirm and that the same constitute a denial of due process and violation of Petitioner's constitutional rights as accorded to him under the 4th and 5th Amendments to the Constitution of the United States, in that:

(a) The subject convictions were based upon unauthorized wire tapping and illegal monitoring by the Government of privileged telephone conversations between Petitioner and his attorney and accountant;

(b) The Government deliberately suppressed documents of an exculpatory nature and knowingly introduced perjurious testimony and false records at Petitioner's trial.

IV.

It is submitted that the facts showing these constitutional violations and the relevance of Petitioner's claims are reflected in the following:

A. BACKGROUND OF THE CASE

Prior to trial, the parties stipulated as to all elements of the offense charged, save and except for the sole issue of "wilfullness". Aside from considerations of ill health, loss of records, hospitalizations, pressures, etc. which precipitated his "late" filing, the very essence of Petitioner's attempts to negate the wilfullness charged rested on his ability to demonstrate:

1. That during each of the years as charged in the Information, (1967-1971), the Petitioner had made timely and appropriate applications for extensions of time to file the required returns and that extensions had, in fact, been granted to him by the Internal Revenue Service.

2. That in addition, Petitioner had filed all of the subject tax returns and fully paid all taxes due thereon, almost one year prior to the filing of Information in the cause.

Petitioner was however frustrated in his efforts to demonstrate the foregoing as a result of his prior loss of all records reflecting the filing of the subject extensions — the originals of which were at all times prior and during trial, in the possession of the Government.

B. ILLEGAL WIRETAPPING AND/OR ELECTRONIC MONITORING OF PETITIONER'S TELEPHONE CONVERSATIONS

In an effort to obtain copies of such valuable exculpatory material, Petitioner made two telephone calls on June 10, 1974 (two days prior to trial) to his attorney

and accountant, wherein Petitioner discussed the matter of his missing extension forms, the relevance thereof, and other defense strategy. Upon information and belief, these highly privileged conversations were the subject of governmental wiretapping and/or other proscribed electronic monitoring. As a direct result of the information obtained from its unlawful eavesdropping, the Government caused a subpoena duces tecum to be issued that same day to Petitioner's accountant (Exhibit B attached).

Prior to Petitioner's telephone conversations, the Government made no previous effort to obtain the documents sought in its subpoena and the record is totally devoid of any similar action taken by the Government in the seven months preceding the trial. Service of such subpoena was effected the next morning (the day prior to trial) by IRS Agent Gay and was accompanied by his instanter demand for the immediate production of all of Petitioner's tax records. In compliance therewith, Petitioner's accountant submitted his files of Petitioner for inspection and at Agent Gay's direction, further provided copies of the only two extensions contained in Petitioner's files for the years 1968 and 1969.

Petitioner submits that through an evidentiary hearing he will be able to establish as a demonstrable fact, the unlawful eavesdropping and wiretapping which precipitated these questionable tactics and demands of the Government.

C. GOVERNMENT'S SUPPRESSION OF EXCULPATORY EVIDENCE AND ITS USE OF PERJURIOUS TESTIMONY AND FALSE RECORDS DURING TRIAL

At trial the Government conceded the filing of extensions for the same years (1968 and 1969) as were provided to Agent Gay by Petitioner's accountant, but vigorously denied the fact that Petitioner had filed extensions for any of the additional years contained in the Information, i.e., 1967, 1970 and 1971 (Tr. 35, 37). Subsequent events and disclosures now demonstrate that this denial was false and deliberately misleading.

Since trial, Petitioner has obtained documents which virtually destroy the evidence utilized by the Government to establish the purported "wilfullness" of the Petitioner. One such document consists of a certified copy of an official IRS transcript page of Petitioner's tax records which reflects not only the filing, but also the granting of an extension to Petitioner for the year 1971 (Exhibit C attached). This document surfaced for the first time approximately six months after trial in the Exhibit File of the records lodged with the Fifth Circuit Court of Appeals immediately following the prosecutor's use and transmittal thereof.

Significantly, the filing vel non of an extension for that specific year (1971) was especially critical to the trial proceedings and constituted the very crux of the factual dispute between the parties (Tr. 155-159). Analysis of this document indicates that at least two additional documents revealing the same exculpatory information existed and were in the possession of the Government prior and during trial, i.e., the original from which the attached exhibit was prepared and the 1971 extension form itself. Significantly, such exhibit bears the same date of preparation (June 26, 1973) as found on each of the other exhibits that the Government did introduce at trial. Moreover, the Government totally

failed to produce any of the extension forms which had been filed by Petitioner — even for the years 1968 and 1969, which the Government was obliged to acknowledge as having, in fact, been filed.

The suppression of these innumerable and exculpatory documents which were at all times in the possession of the Government, clearly demonstrates the Government's conscious and deliberate efforts to deceive the Court and Jury. Petitioner submits that the significance of these documents could not have escaped the attention of either the prosecutors or the IRS agents who testified directly contra to the information contained therein, notwithstanding the Government's possession of these documents prior and during trial.

D. MATERIALITY OF THE SUPPRESSED EVIDENCE AND ITS EFFECT UPON THE OUTCOME OF THE CAUSE.

Aside from the exculpatory effect which such records and extensions would have had on the jury, the Government's deliberate suppression of the same had an even greater impact upon the outcome of the cause through consequent destruction of Petitioner's credibility. The record in this regard reveals that, despite the almost prohibitive weight of "official" records and the testimony of the District Director's "personal representative", the Petitioner testified under penalty of perjury (without supporting documents), that he did, in fact, file extensions for each of the years 1967 thru 1971 (Tr. 148). Ergo, as a result of Government suppression, this irreconciliable conflict could only be resolved by the jury through a determination of

credibility. Indeed, at one point in the trial the Government actually pitted Petitioner's testimony against false and misleading records and the testimony of the Government, viz —

CROSS-EXAMINATION OF VERNELL, Page 148

"Q Now, you heard the testimony of Mr. McDaniel?

A Yes, sir.

Q Have you examined Government Exhibit 1 — No. 8?

A Relative to my extension applications?

Q Yes, sir.

A Yes.

Q They don't show that you filed extensions for all those years, do they?

A They are incorrect.

Q You believe they are incorrect.

A I know they are incorrect.

Q What years did you file extensions for, sir?

A I filed extensions for 1967, 1968, 1969, 1970 and 1971."

Moreover, and aside from the sine qua non type effect which the Government's suppression had upon the Petitioner's credibility and the outcome of the cause, under the tenets of U.S. v Goldstein, (CCA 3rd, 1974) 502 F 2d 526, the Goverment's production of the subject extensions and records would have required Petitioner's acquittal as a matter of law — such result being mandated by reason of the variance which would have existed between the dates charged in the Information and those which would otherwise have been established through such extensions. Significantly, the Goldstein case represents the only appellate Court decision dealing with precisely this issue; its opinion being rendered two months after petitioner's trial.

V.

It is submitted that the foregoing demonstrates not only impermissible actions of the Government in its prosecution of the instant case, but the gross intrusions resultant therefrom upon the constitutional rights of the Petitioner and the consequent denial to him of due process of law. Petitioner accordingly claims both a constitutional and statutory right to an evidentiary hearing wherein such matters may properly be considered and Petitioner's convictions may thereupon be vacated.

WHEREFORE, based upon the foregoing facts, and pursuant to 28 USC 2255, the Petitioner is being restrained of his liberty by the United States in violation of his constitutional rights and he therefore prays that the within Petition be granted and an order entered vacating his conviction and sentence.

Respectfully,

/s/ Louis Vernell
LOUIS VERNELL,
in properi personam

VERIFICATION OF PETITION

STATE OF FLORIDA)
) ss
COUNTY OF OKALOOSA)

The undersigned, being first sworn under oath, presents that he has subscribed to the foregoing Petition and does state that the information contained therein is true and correct.

/s/Louis Vernell
Signature of Affiant

SUBSCRIBED AND SWORN TO BEFORE ME THIS 27 DAY OF February 1976.

John C. Henry
Notary Public

My commission expires:
1-4-77

Appendix K

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 76-439 CIV-CF

[FILED JUNE 4, 1976]

LOUIS VERNELL, JR.

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

ORDER OF DISMISSAL

Louis Vernell, Jr. has filed a Motion to Vacate Sentence pursuant to Title 28 U.S.C. Section 2255 Attacking a nine (9) month sentence of imprisonment imposed by this Court on July 18, 1974. Such sentence was imposed pursuant to a jury verdict of guilty to the offense of failure to timely file income tax returns for the years 1967-1971 in violation of Title 26 U.S.C. Section 7203.

The record reflects that on April 16, 1976, subsequent to the filing of the instant Petition, this court modified and reduced its sentence previously imposed to "time served." Thus, although Petitioner has since been released from custody; this 2255 petition was filed prior thereto.

This court is cognizant that while 2255 relief is not generally available to a person filing a Motion to Vacate after the complained of sentence has completely expired, it is well settled that if one is imprisoned at the time of the original filing of the motion, and released before determination thereof, the cause of action does not become moot. Carafas v. LaVallee, 391 U.S. 234 (1967); Sibron v. New York, 392 U.S. 40 (1967); Reed v. United States, 471 F.2d 721 (5th Cir., 1973). Moreover, in his "Response to Government's Motion to Dismiss", Petitioner has alleged various "disabilities or burdens" flowing from his conviction; demonstrating a further basis to conclude that the petition is not moot. Carafas v. LaVallee, supra.

As grounds for relief Petitioner has alleged herein that:

1. The Respondent engaged in unauthorized wiretapping.

2. Suppressed documents of an exculpatory nature and knowingly introduced perjurous testimony and false records at Petitioner's trial.

The gist of Petitioner's contentions is predicated upon the discovery by Petitioner of a certified copy of an official IRS Transcript of Petitioner's tax returns showing that he had not only applied for, but actually was granted an extension for the year 1971; the existance of such extension being crucial only to the issue of "willfullness". Petitioner himself acknowledged that he had not filed his return within the time limits set by any such extension T 154. Nonetheless, Petitioner herein

alleges that the suppression of such evidence greatly affected his credibility at trial as to the issue of whether he actually received extensions for the years in question.

The record reflects however that during the course of Petitioner's direct appeal he successfully moved to supplement the "appendex" with such IRS Transcript and did in fact refer to the existance of such document in his Appellate Reply Brief. In Point III of such brief he argues that the existance of such transcript of account shows that he had received an extension within which to file his 1971 income tax return, and therefore, the testimony of government witness Walter McDaniel in regard thereto was erroneous. Nonetheless, Petitioner's conviction was affirmed by the Fifth Circuit Court of Appeals on February 25, 1975. See 510 F.2d 383.

On Rehearing Petitioner specifically argued that his credibility was severly damaged by such nondisclosure, especially in light of the government's testimony that Petitioner had not sought an extension for the year 1971. Petitioner thereafter presented the gist of his suppression argument in his Petition for a Writ of Certiorari which was denied on December 8, 1975.

On August 7, 1975, Petitioner filed a Motion for New Trial presenting to this court grounds substantially similar to those raised in the instant petition, including the exact same issue of illegal monitoring of telephone conversations. See Page 3 of Motion for New Trial. On August 11, 1975 Petitioner unsuccessfully appealed from the denail of such motion. On this appeal, Petitioner specifically raised the issues of illegal wiretapping, introduction of perjurous testimony and the suppression of the IRS Transcript and its resultant effect upon Petitioner's credibility.

It thus becomes apparent that Petitioner is now attempting to once again raise the same issues which have been presented on other occasions to this court and to the Fifth Circuit Court of Appeals. It is well settled that although traditional notions of Res Judicata do not apply to 2255 proceedings, this court may exercise a sound judicial discretion and decline to re-try issues which have already been presented and ruled upon on other occasions. See Del Genio v. U.S., 352 F.2d 304 (5th Cir., 1965); Bearden v. U.S., 403 F.2d 782 (5th Cir., 1968); Blackwell v. U.S., 429 F.2d 514 (5th Cir., 1970); e.g. U.S. v. Selegman, 117 F.Supp. 508 (W.D. Penn. 1953).

Upon careful review of the records of this case, this court must conclude that to permit Petitioner to initiate a collateral attack upon grounds, the substance of which have already been rejected by this as well as the Appellate Court, would merely result in the "purposeless duplication of the review process." Blackwell, supra.

For these reasons it is hereby

ORDERED AND ADJUDGED that this Petition be DISMISSED.

DONE AND ORDERED at Miami, Florida, this 28 day of May, 1976.

/s/ Charles B. Fulton
CHIEF UNITED STATES
DISTRICT JUDGE

cc: Mr. Louis Vernell
100 S. E. 2nd Street,
Miami, Florida

Marsha L. Lyons,
Assistant U. S. Attorney
300 Ainsley Building
Miami, Florida

Appendix L

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 76-439 CIV-CF

LOUIS VERNELL, JR.
Petitioner,

-vs-

UNITED STATES OF AMERICA,
Respondent.

ORDER DENYING MOTION FOR REHEARING AND VACATION OF ORDER OF DISMISSAL

Louis Vernell has filed a Motion for Rehearing and Vacation of An Order of Dismissal entered by this Court on May 28, 1976.

It is hereby

ORDERED AND ADJUDGED that such Motion be DENIED. However, in the interest of justice this Court feels constrained to further clarify those facts which have led it to conclude that the grounds raised in the instant Section 2255 motion to vacate had been previously rejected by this Court as well as the Fifth Circuit Court of Appeal and that redetermination of those

issues would result in the "purposeless duplication of the review process".[1]

The record reflects that the Fifth Circuit Court of Appeals affirmed Petitioner's conviction on February 25, 1975 and at the same time granted Petitioner's motion to supplement the Appendix with an IRS Transcript showing that Petitioner had filed (and allegedly was granted) an extention for filing his 1971 Income Tax Return. However in a reply brief filed on January 13, 1975, Petitioner argued that the existence of such transcript of account showed that he had been granted an extension within which to file his 1971 Income Tax return and that therefore the testimony of Walter McDaniel was erroneous and that there was a variance between the proof and the indictment citing United States v. Goldstein, 502 F.2d 526 (3rd Cir., 1974).

On April 10, 1975 Petitioner filed a Petition for Rehearing in which he argued that he was prejudiced by the non-disclosure of such IRS Transcript at trial in that the false and erroneous testimony of McDaniel destroyed Petitioner's credibility. On May 17, 1975 Petitioner filed a "Motion for Remand of Evidentiary Hearing" in which he again called the Fifth Circuit's attention to the alleged prejudice occasioned by the suppression of such IRS Transcript and alleged that the government had engaged in illegal monitoring of his telephone conversations. On June 24, 1975 the Fifth Circuit denied Petitioner's Petition for Rehearing giving no indication that it had not considered matters relating to the "Government's suppression, perjurious testimony and falsification of records." The Fifth Circuit however also denied Petitioner's motion that the case be remanded for an evidentiary hearing and declined consideration only as to the grounds raised in that motion (as opposed to Petitioner's motion for rehearing) on the basis that such grounds had been raised for the first time on Appeal and rehearing.

Petitioner thereafter sought certiorari in the United States Supreme Court in which he again argued the issue of variance. Certiorari was denied in December of 1975.

On August 7, 1975, during the pendancy of his Petition for certiorari Petitioner filed a motion for new trial in the trial court. Petitioner in effect concedes in the instant motion for rehearing that "matters of government suppression, perjurious testimony of falsification of records" were raised in such motion for new trial which motion contained the following language:

> "That accordingly and as a result of newly discovered evidence, the Defendant submits that in contravention of his constitutional rights, the Government failed to disclose and otherwise suppressed evidence of an exculpatory nature; that, further, the Government offered into evidence in the cause, false

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[1]The issues raised in such Section 2255 motion to vacate are set forth as follows:

1. The Respondent engaged in unauthorized wiretapping.

2. The Respondent suppressed documents of an exculpatory nature and knowingly introduced perjurous testimony and false records at Petitioner's trial.

and erroneous testimony and records; that as reflected infra, such actions and conduct, on the part of the Government, not only destroyed Defendant's credibility before the jury, but otherwise materially affected the outcome of the cause."

Petitioner also raised the illegal wiretap issue in such motion for new trial which was denied by order dated August 8, 1975 without an evidentiary hearing. In his appellate brief on Direct Appeal from the denial of such motion for new trial Petitioner presented the following allegations to the court's attention:

1. Illegal wiretapping.
2. The introduction of false and perjurious testimony of Walter McDaniel.
3. The failure of the government to correct such perjured testimony.
4. The effect of such suppression on the Petitioner's credibility at trial.

In his reply brief at pages 2-3 Petitioner specifically stated that issues presented in such Appeal were as follows:

"the defendant's charges of suppression of evidence, the introduction of false records and testimony in the cause, and the Government's presumed use of illegal wiretapping".

The Fifth Circuit Court of Appeals affirmed the denial of such motion on January 21, 1976.

This Court thus feels constrained to reaffirm its position that the grounds raised in the subject 2255 Petition have previously been decided by both this Court and the Fifth Circuit Court of Appeals in Petitioner's Petition for Rehearing; Motion for New Trial and the Direct Appeal from the denial thereof. See Laughlin v. United States, 474 F.2d 444 (D.C. Cir., 1972), Blackwell v. United States, 429 F.2d 514 (5th Cir., 1970); Del Genio v. United States, 352 F.2d 304 (5th Cir., 1965); United States v. Selegman, 117 F.Supp. 508 (W. Penn., 1953).

DONE AND ORDERED at Miami, Florida, this 7 day of September, 1976.

/s/ Charles B. Fulton
CHIEF UNITED STATES
DISTRICT JUDGE

cc: Mr. Louis Vernell, Jr.
United States Attorney

Appendix M

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 76-439-CIV-CF

LOUIS VERNELL, JR.,

Petitioner

v

UNITED STATES OF AMERICA

Respondent

NOTICE OF APPEAL

TAKE NOTICE that Louis Vernell, Jr., Petitioner herein, takes and enters his appeal to the United States Court of Appeals, 5th Circuit, to review that certain judgment and/or order of dismissal as entered in the within cause on May 28th, 1976 and filed June 4th, 1976 and to further and additionally review that certain judgment and/or denial of Motion for Rehearing and Vacation of Order of Dismissal as entered September 7th, 1976 and filed on September 28, 1976.

All parties to this cause are called upon to take notice of the entry of this Appeal.

I HEREBY CERTIFY that a true copy of the above was mailed this 8th day of October, 1976 to:

United States Attorney
Ainsley Building
Miami, Florida

Louis Vernell, Jr.,
in Proper Person
100 S.E. 2nd Street
Miami, Florida 33131

Appendix N

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 75-3128

UNITED STATES OF AMERICA,
Plaintiff/Appellee,

vs.

LOUIS VERNELL, JR.,
Defendant/Appellant.

AFFIDAVIT

STATE OF FLORIDA)
) SS
COUNTY OF DADE)

E. DAVID ROSEN, being duly sworn, upon oath, deposes and says as follows:

1. That he was attorney of record for the defendant/appellant herein prior and during trial proceedings in the United States District Court for the Southern District of Florida, Miami Division.

2. That Affiant has been presented a copy of the attached Exhibit which reflects the filing and granting

of an application made by the defendant/appellant for an extension of time to file his income tax return for the taxable year 1971.

3. That Affiant is confident that he had not received and had not seen the attached transcript of account reflecting the granting of an extension of time to the defendant/appellant to file his 1971 income tax return until presented to him on this date.

4. That had the attached document been available, the use of it would have been reflected in the cross-examination of the government's first witness, WALTER McDANIEL, and the direct examination of the defendant in support of his position that an extension had been applied for regarding that year.

5. That although the issue of whether or not the defendant had filed his extension for the year 1971 was contested during trial proceedings, the government took the position that none had been filed; that except for his sworn testimony, the defendant was unable to establish his filing of such extension and no records to support such fact were available or otherwise made available to the defendant.

FURTHER AFFIANT SAYETH NOT.

(stamp) E. DAVID ROSEN
E. DAVID ROSEN

SWORN TO AND SUBSCRIBED BEFORE ME this 15th day of August, 1975.

/s/ Sandra S. Landfield
NOTARY PUBLIC
STATE OF FLORIDA AT LARGE

MY COMMISSION EXPIRES: 3/29/78

No. 77-1145

In the Supreme Court of the United States

OCTOBER TERM, 1977

LOUIS VERNELL, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1145

LOUIS VERNELL, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Pursuant to 28 U.S.C. 2255, petitioner seeks to set aside his convictions for failure to file income tax returns for five successive years.

After a jury trial in the United States District Court for the Southern District of Florida, petitioner, an attorney, was convicted of failing to file income tax returns for the years 1967 through 1971, in violation of 26 U.S.C. 7203. It was stipulated at trial that petitioner was required by law to file tax returns for each of the years, that he did not do so until May 1973, after the Treasury agents' investigation had begun, and that his gross income was substantially that charged for each year in the information, *i.e.*, $72,826 in 1967, $42,086 in 1968, $34,275 in 1969, $50,774 in 1970, and $44,774 in 1971 (R. 29, 47,

74).[1] During the investigation petitioner advised the agents that he had been too busy trying to make money to file the returns (R. 59, 61). He was sentenced to concurrent nine-month terms of imprisonment and fined $5,000 (Pet. 7). The court of appeals affirmed without opinion (Pet. App. 10), and this Court denied certiorari (423 U.S. 1014).

In August 1975, petitioner filed a motion for new trial on the ground of newly discovered evidence, alleging that the government had suppressed exculpatory evidence, had introduced false testimony and records into evidence, and had improperly monitored telephone conversations between petitioner and his accountant and attorney (Pet. App. 14-18). Petitioner asserted that these improprieties related to the alleged grants of extensions of time by the Internal Revenue Service for the filing of each of the five tax returns in question (*ibid.*). The district court denied petitioner's motion (Pet. App. 19), and the court of appeals summarily affirmed (Pet. App. 21).

In February 1976, petitioner brought the present Section 2255 proceeding renewing the allegations of his previously denied motion for a new trial (Pet. App. 22-39). The district court denied relief (Pet. App. 40-49), and the court of appeals affirmed *per curiam* (Pet. App. 1-2). The court of appeals stated: "The grounds raised in the instant §2255 petition have been previously decided by both the district court and this court in petition for rehearing, motion for a new trial, and the direct appeal therefrom" (Pet. App. 2).

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[1]"R." refers to the original record filed in the court of appeals on petitioner's direct appeal from his conviction.

While the previous rejection of identical claims by petitioner is a sufficient ground for denying relief under Section 2255 (*Laughlin* v. *United States*, 474 F. 2d 444 (C.A. D.C.), certiorari denied, 412 U.S. 941; *Dirring* v. *United States*, 370 F. 2d 862 (C.A. 1); *Meyers* v. *United States*, 446 F. 2d 37 (C.A. 2)), petitioner is, in any event, not entitled to any relief. Petitioner's allegations of governmental impropriety all involve his claim that he filed applications for extensions of time within which to file his return. Petitioner complains (Pet. 7-8) that the government's use of an exhibit showing that he had not applied for extensions unfairly damaged his credibility before the jury because he had lost his records for the years in question. But assuming that petitioner did in fact timely apply for extensions of time to file his income tax returns and that these applications were granted, petitioner would still not be entitled to relief. Petitioner stipulated at the trial that he did not file his tax returns for 1967 through 1971 until May 1973, after the Treasury agents' investigation had begun (R. 29). It is therefore clear that petitioner did not file any of the returns until long after the expiration of whatever extensions of time may have been granted and that any error in the testimony of government witnesses with respect to whether extensions were sought or granted was harmless.[2]

Indeed, if petitioner applied for extensions each year as he now claims, it necessarily follows that he was well aware of his obligation to file returns at the time they were due. Evidence of petitioner's contention would accordingly have strengthened the government's case with respect to the element of willfulness, *viz.*, that the repeated failures to file constituted "voluntary, intentional

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[2]Petitioner has not asserted that the alleged extensions would have permitted the returns to be filed as late as May 1973.

violation[s] of a known legal duty." *United States* v. *Pomponio*, 429 U.S. 10, 12; *United States* v. *Bishop*, 412 U.S. 346, 360. There is accordingly no basis to set aside petitioner's conviction under Section 2255.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

APRIL 1978.

DOJ-1978-04